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ABSTRACT

The history of social policy efforts to remediate racial discrimination can be traced to the post-Civil War period. This paper examines the tortuous course that affirmative action has traveled. It discusses the historical, philosophical, and constitutional issues surrounding the topic of civil rights, starting with the first antidiscrimination laws and Constitutional amendments passed shortly after the Civil War, and continuing through the turbulent 20th century. The analysis also includes statutory and case law that has developed as both the legislature and the courts have attempted to ascertain the appropriate role to be played by the federal government as positioned against state governments and private citizens when it comes to the guarantee of basic individual freedoms under the Federal Constitution. Finally, the paper discusses the implications for affirmative action and equal opportunity in the realm of education and employment in light of current social policy and judicial reality. It concludes by offering speculations about the future of affirmative action. (Contains 122 footnotes, 25 references, and a list of 20 cases.) (LMO)

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THE FUTURE OF AFFIRMATIVE ACTION: SOCIAL POLICY AND JUDICIAL REALITY

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INTRODUCTION

The history of social policy efforts to remediate racial discrimination can be traced to the post-Civil War period. Starting in 1866 the attempt to reduce to a legal document the constitutional promises of freedom embodied in the Union victory resulted in a series of civil rights legislation. These statutes were passed under close, even harsh scrutiny by politicians, jurists, pundits and citizens. Unjustified discrimination has been, and remains, a major problem of American life. Dilemmas over how to respond to the problem raise some of the most profound and delicate questions of morality, politics and law.[1]

Despite the stirring assertion in the Declaration of Independence that "All men are created equal," this was certainly not the state of affairs for either blacks or Native Americans or, in reality, women, at the time the country was founded. Not only did this inequality exist in spirit through the indifference shown by summarily removing Native Americans from their land upon the whim of white settlers, and the destroying of black families and culture as they were forcibly kidnapped from their homes and sold as chattel to anyone with the means to purchase, but it was actually encoded in that revered document, the United States Constitution. Written into the constitution was the refusal to admit that a slave was a "person" preferring instead to count such an individual as three-fifths of a person for the purpose of representation. Under the terms of the Constitution, federal abolition of the slave trade was forbidden until 1808 and states were required to return fugitive slaves to the states of their owners.

In the aftermath of the Civil War, strides were taken to wipe out this legal sanction of discrimination. The Thirteenth, Fourteenth and Fifteenth Amendments, along with enabling legislation were passed. Even this noble gesture, however, was not without controversy for there continued to exist those both within and outside the legislature who were hesitant to increase the scope of power of the

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[1]Kent Greenawalt, *Discrimination and Reverse Discrimination* (New York: Alfred A. Knopf, 1983), p. 3.

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federal government, regardless of how seemingly ethical the motive. While individuals may have been able to agree to the fact of the existence of discrimination, consensus has never been achieved regarding the methods to be used by society to rectify past and respond to current discrimination. At a moral level, the concern is about principles of social justice, liberty, and welfare. Judgments must be made about what society owes to those who have suffered from discrimination and about the restraints on the liberty and opportunity of others that may be undertaken to satisfy these debts and to reduce future discrimination and its harmful consequences.[2] Legislation is passed followed by dissection and interpretation from the courts followed by even more legislation. And so has been the pattern of discourse around the topic of civil rights over the past 100 plus years.

Consequently, for over half of the thirty years of the existence of state and federal laws on affirmation action - laws which were passed to attempt to remove any barriers to the providing of equal protection to women and people of the color - the concept has faced controversy. The 1970's not only witnessed heated controversy about the legal viability of affirmative action legislation from a constitutional perspective, but also questioned the basic wisdom of using legislation as the vehicle to carry out social policy. There existed no judicial precedent to support or justify the innovative programs embodied in federal, and eventually state affirmative action legislation. Shortly after his election in 1980, Senator Orrin Hatch proclaimed to the press, "I will outlaw affirmative action."[3] During the Senate subcommittee hearings on his proposed amendment to abolish affirmative action legislation, Senator Hatch referred to affirmative action programs as "a medieval notion of government by status - wholly at variance with the principles of civil rights."[4]

Even today, in light of a recent United States Supreme Court decision[5] which conceivably narrowed the scope of affirmative action program, opponents of affirmative action have stepped up their

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[2]*Ibid.*, p. 3.

[3]Robert M. O'Neil, "Ethnicity and the Law: Of Policy and the Constitution," *Ethnicity, Law and the Social Good.* vol. II: Ethnicity and Public Policy Series. Winston A. Van Horne, ed. and Thomas V. Tonnesen, mng. ed. (Madison, WI: Board of Regents, University of Wisconsin, 1983). p. 26.

[4]*Ibid.*, p. 26.

[5]On June 12, 1995 the United States Supreme Court on a 5-4 vote in the case of *Adarand Constructors, Inc. v Pena* 115 S.Ct. 2097(1995) failed to hold affirmative action programs used by the Department of Transportation which provided a bonus to contractors if they hired minority subcontractors

attacks on existing legislation. In July 1995 Senate Majority Leader Robert J. Dole and Rep. Charles T. Canady, Chairman of the House Judiciary Subcommittee on the Constitution filed identical bills. The Dole-Canady bill (S. 1085 and H.R. 2128) would prohibit the federal government from using racial or gender-based preferences in awarding contracts and from requiring or encouraging contractors to use such preferences. The proposal also would ban programs that use goals, set asides and timetables to remedy discrimination, and would forbid the federal government from using hiring and promotion decisions on factors such as race, color, national origin or gender.[5] Senator Phil Gramm and Rep. Gary Franks attempted, without success, to amend various appropriation bills with language forbidding set-asides for minority or women contractors. During numerous Congressional hearings held during the 104th Congress, the concept of "empowering" minorities through the heightening of their economic status by encouraging home ownership and education was held forth by both Democrats and Republicans as the appropriate replacement for current affirmative action programs which include, according the critics of affirmative action, preferences which are no longer needed and which have aided women and minorities at the expense of more qualified white males.

This paper will examine the tortuous course which affirmative action has traveled. Starting with the first anti-discrimination laws and Constitutional amendments passed shortly after the Civil War, through the turbulent twentieth century, the historical, philosophical, and constitutional issues surrounding the topic of civil rights will be discussed. This will include, by necessity, the study of the statutory and case law which has developed as both the Legislature and the courts have attempted to ascertain the appropriate role to be played by the federal government as positioned against state governments and

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unconstitutional. The Court sent the case back to the federal appellate court level to reexamine the issue under a "strict scrutiny" standard. Up until this case, state and local governments had required only a narrowly drawn "compelling state interest" to justify affirmative action plans. The federal government only required that affirmative action programs be "substantially related" to an important goal. In response to the *Adarand* decision, President Clinton directed all federal departments and agencies to eliminate or overhaul any program that "creates a quota, creates preferences for unqualified individuals, creates reverse discrimination or continues even after its equal opportunity purposes have been achieved." *See* Rhonda McMillion. "Affirmative Action Struggle: Congress, ABA at Odds Over Government Role in Equality Programs." *ABA Journal*, January 1996, p. 93.

[6]Rhonda McMillion, "Affirmative Action Struggle: Congress, ABA at Odds Over Government Role in Equality Programs." *ABA Journal*, January 1996, p. 93.

private citizens when it comes to the guarantee of basic individual freedoms under the Federal Constitution. Finally, implications for affirmative action and equal opportunity in the realm of education and employment will be discussed in light of current social policy and judicial reality, with the ultimate question being posed - What is the future of affirmative action?

THE HISTORICAL CONSTITUTIONAL SETTING

One of the major premises upon which the policy of affirmative action is built, is the assumption that one of the roles of the federal government is to champion the attainment by private citizens of full realization of their constitutionally protected rights as enumerated in the first ten amendments to the federal constitution. This assumption, however, was not drafted either in word or in thought into the Bill of Rights. Prior to 1866, the Constitution protected fundamental personal rights only against infringement by the federal government - not infringement by state governments, not infringement by private individuals or corporations. The Bill of Rights provided no more than a legal defense for citizens against certain obnoxious acts by the federal government. This limited role played by the Constitution reflected the early fears of a powerful central government and the early reliance on states as the protectors of the individual's rights and liberties.[7] As the abolitionists moved to consolidate their victory after the Civil War, their internal controversy between federalists and nationalists gave rise to three new constitutional amendments and five supplementary congressional statutes, all of which set in motion a precedent setting shift of the federal government relative to the civil rights of its citizens from prime threat to ultimate defender of the civil liberties of individuals.[8]

The Thirteenth Amendment to the Federal Constitution was the initial attempt in this constitutional shift. With its ratification on December 18, 1865 not only the federal government, but also states and ultimately individuals were pulled under the enforcement wing of the Constitution by the way in

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[7]Eugene Gressman, "The Unhappy History of Civil Rights Legislation," *Michigan Law Review*, 50 June (1952), 1323-1342. Reprinted in *Black Americans and the Supreme Court Since Emancipation: Betrayal or Protection?*, ed. A.M. Paul, American Problem Studies. (New York: Holt, Rinehart and Winston), p. 9.

[8]*Ibid.*, p. 10.

which the amendment was worded, abolishing both slavery and involuntary servitude throughout the nation and giving power to Congress to enforce this abolition. No exceptions were made for the practice of slavery within states or by private individuals. The prohibition was absolute. It did not take the proponents of states rights long to object to the Thirteenth Amendment as an unconstitutional invasion of private rights. The legislative response to such opposition was swift in coming through a civil rights bill and an amendment to the Freedmen's Bureau Act. These two bills represented the efforts of the amendment's framers, acting almost simultaneously with its ratification, to implement the intentions of the amendment.[9] Neither bill was intended to exclusively benefit blacks, but rather were enacted to protect the civil rights of all citizens and ensure enforcement of such through the mechanisms of the federal government. In the words of Senator Trumbull, the principal draftsman of the Thirteenth Amendment and the civil rights bill under that amendment, "Congress is bound to see that freedom is in fact secured to every person throughout the land; he must be fully protected in all his rights of person and property and any legislation or any public sentiment which deprived any human being in the land of those great rights of liberty will be in defiance of the Constitution; and if the states and local authorities, by legislation or otherwise, deny those rights, it is incumbent on us to see that they are secured."[10]

This civil rights bill became the Civil Rights Act of 1866. One of its most power effects was to overrule the *Dred Scott* decision by declaring that all persons who were born in the United States of American and were not a subject of any foreign power, were citizens of the United States of America. Although most courts were more than willing to uphold the constitutionality of the Civil Rights Act of 1866, doubts as to the adequacy of the wording of the Thirteenth Amendment and the Civil Rights Act of 1866 continued to mount until redrafting of the provisions was considered unavoidable. This desire to ensure the continuation of the nationalization of civil rights was the actual driving force behind the drafting and adoption of the Fourteenth Amendment. The framers wished by virtue of a new constitutional

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[9]Gressman, p. 11.

[10]Quoted in Eugene Gressman, "The Unhappy History of Civil Rights Legislation," *Michigan Law Review*, 50 June (1952), 1323-1342. Reprinted in *Black Americans and the Supreme Court Since Emancipation: Betrayal or Protection?*, ed. A.M. Paul, American Problem Studies. (New York: Holt, Rinehart and Winston), p.11.

provision, to make certain that civil rights would be truly nationalized, that the federal government would inject itself into this realm that had hitherto been exclusively reserved to the states, and that all individuals would be protected in the full and equal enjoyment of the rights of person and property.[11]

The Fourteenth Amendment was the work product of a congressional Joint Committee on Reconstruction which held formal hearings on the conditions currently existing in the south. These hearings revealed, through the testimony of the overwhelming majority of the 125 witnesses, that most civil rights abuses being perpetrated on blacks were at the hands of private citizens or individuals acting under the color of state law, and not through abusive state action. Blacks and white Union sympathizers were the victims of the abuses. The demonstrated fact that violations of civil rights were primarily the product of individual rather than state action made it unreasonable for the committee to limit the scope of the amendment to state action, and subsequent debates in Congress implicitly assumed that individual action, not just state action, was covered by the amendment.[12] It was the privileges and immunities clause which the framers regarded as the core of Section 1 of the Fourteenth Amendment. The equal protection and due process clauses were treated by them as of secondary importance, as appendages to the protection afforded the privileges and immunities or the fundamental rights of national citizenship. Those clauses simply meant that in guaranteeing the basic human rights covered by the privileges and immunities clause, the federal government was to see to it that these rights were recognized and effectuated by the states on an equal basis and that any necessary deprivation of those rights by the states was in accordance with basic principles of procedural due process.[13]

The Fifteenth Amendment, which prohibited racial discrimination in voting, was ratified on March 30, 1870. On May 31, 1870 a new Civil Rights Act was passed which reenacted the 1866 act under the belief that whatever doubts may have previously existed as to constitutional validity were now removed by the Fourteenth Amendment.[14] On April 20, 1871, Congress passed another statute, commonly known as the Ku Klux Klan Act, which was a reaction to the widespread illegal action, including actions of the

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[11]Gressman, p. 12.
[12]*Ibid.*, pp. 12-13.
[13]*Ibid.*, p. 14.
[14]*Ibid.*, p. 14.

Klan, in southern states which was endangering individuals and property. Section 2 of the Ku Klux Klan Act of 1871 made it an offense to conspire together, or go in disguise upon the public highway or upon the premises of another for the purpose of depriving any person or any class of persons of the equal protection of the laws, or equal privileges or immunities under the laws.[15] The capstone of the congressional civil rights program came on March 1, 1875, with the adoption of an act to protect all citizens in the civil and legal rights.[16] This Act reaffirmed the principles which underlay the adoption of both the Fourteenth and the Fifteenth Amendment by forbidding every indicia of slavery or involuntary servitude where such discrimination was practiced by individuals in a public or quasi-public capacity.[17]

So came to an end possibly the most fruitful period thus far in constitutional history of congressional action aimed at securing civil rights for all citizens. Never before had there been such a flurry of federal activity culminating in legislation regarding civil rights. The changes made by this series of enactments and constitutional additions were of a most significant nature, altering substantially the balance between state and federal power.[18] While the original impetus of this legislation was to improve the status of recently freed slaves and impose order on the reconstructionist south, the effect of the principles underlying this legislation reached far beyond this original goal and is felt even today in civil rights legislation and affirmative action plans. It is important to note at this point, and to keep in mind throughout the discussion of the future of current affirmative action programs, that one class of persons that enjoyed no success at all in claims under the equal protection clause, but which has enjoyed success under affirmative action, is women. Women were not constitutionally assured of the right to vote until the Nineteenth Amendment was adopted in 1920, fifty years after the adoption of the Fifteenth Amendment which outlawed racial discrimination in voting. Although the sweeping legal inequalities that characterized the status of women were moderated by legislation through the first half of the twentieth century, it remained accepted until quite recently that gender was a permissible basis of classification for many

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[15] *Ibid.*, p. 15.
[16] *Ibid.*, p. 15.
[17] *Ibid.*, p. 15.
[18] *Ibid.*, p. 16.

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matters.[19] Even today, some segments of society and political action groups comprised of both men and women, continue to support the unequal treatment of women as essential for the continuation of the "traditional family" which is assumed to be synonymous with stability and a "God-given" order for society. Consequently, the total inappropriateness of gender discrimination has not yet won the acceptability or wide acclaim generally afforded the topic of racial discrimination even as society moves into the 21st Century.[20]

THE CONTINUATION OF DISCRIMINATION

Even as the Congress forged onward in changing its role from observer to protector of the civil rights of all citizens, there existed something over which it had no control. The continued discriminatory patterns practiced by a large number of individuals, both in exercise of state power and as private citizens was not something within the traditional powers of congress to effect. Looking at it in a rational manner, discrimination seems to contradict the "frontier spirit" of which the United States seems so proud; the idea of individual freedom, that all are created equal and that hard work shall bear the fruit of success. And yet in the earlier twentieth century, despite federal legislation, discrimination occurred again and again.[21] In

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[19]Greenawalt, p. 28.

[20] In the 1979 case of *Regents of University of California v Bakke*, 438 U.S. 265, 98 S.Ct. 2733, the Court reflected this sentiment in its majority opinion: "The resolution of these same questions in the context of racial and ethnic preferences presents far more complex and intractable problems than gender-based classifications. more importantly, the perception of racial classifications as inherently odious stems from a lengthy and tragic history that gender-based classifications do not share. In sum, the Court has never viewed such classification as inherently suspect or as comparable to racial or ethnic classifications for the purpose of equal protection analysis." 438 U.S. at 304.

[21]This was especially true in the area of employment. In response to a threatened black protect march on Washington, D.C., in June 1941 President Franklin D. Roosevelt issued Executive Order 8802. The order prohibited discrimination in government employment and declared it to be the duty of employers and labor organizations to provide for the full and equitable participation of all workers in defense industries, without discrimination because of race, creed, color, or national origin. To enforce the order, Roosevelt created a Fair Employment Practices committee (FEPC) with authority to receive and investigate complaints of discrimination and resolve them through negotiation with the aggrieved individual and the employer. In 1943, under Executive Order 9346, the president extended the anti-bias ban to government contractors and reconstituted and strengthened the FEPC, concerning discriminatory employment practices. Although the wartime FEPC had little permanent impact on employment practices and was terminated by Congress in 1946, it put employment discrimination on the civil rights agenda and pioneered the approach to ending job bias that was eventually embodied in the Civil Rights Act of 1964. *See* Herman Belz, *Equality Transformed: A Quarter-Century of Affirmative Action*. (New Brunswick: Transaction Publishers, 1991). p. 14.

the South, and in some northern cities, racial discrimination took the form of segregation, which was simply a progression of thought which had evolved through slavery and the *Dred Scott* decision.[22] The South had fought the civil war to keep slavery and it had lost. Next it tried legislation to maintain the "power" of the white citizens, commonly referred to as the Black Codes, and was once again ultimately unsuccessful. Segregation then stepped into the vacuum and became a very successful tool through which whites were able to control and dominate the black population.

It was this continued discrimination and the inequities which it produced which came to a head through civil disobedience and even violent protest in the civil rights movement of the 1950s and 1960s. Despite the passage of post-Civil War federal anti-discrimination legislation, blacks, Hispanics and native Americans continued to be disproportionately represented in the lower socio-economic stratas of society. Employment and educational opportunities were still not "equal." In response to this unrest, on July 2, 1964 President Johnson signed into law the Civil Rights Act of 1964 which dealt with discrimination in housing, public accommodation, education and employment. In 1965 the Department of Labor published a monograph entitled *The Negro Family: The Case for National Action*, commonly referred to as the Moynihan Report.[23] The new and special effort call for by the Moynihan Report was affirmative action. It was designed to produce the group results required by the doctrine of equal opportunity, based on the assumption of racial equality.[24] The architects of affirmative action were minority groups, politicians, and affirmative action "liberals" who were trying to implement the philosophy of distributive justice, first advanced in the time of Aristotle, that equals be treated equally, precluding arbitrary distinctions based on irrelevant characteristics.[25] The very act of discrimination on the basis of race violated the above stated tenets of distributive justice thus creating hostility and divisiveness within society. It could no longer be plausibly argued that such discrimination was necessary to avoid racial strife or further social policies.

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[22]*Dred Scott v Sandford*, 19 How. 393 (1857)

[23]*See* Daniel Moynihan, *The Negro Family; The Case for National Action*, Office of Policy, Planning, and Research, U.S. Department of Labor (Washington D.C.: Government Printing Office, March 1965).

[24]J.C. Livingston, *Fair Game? Inequality and Affirmative Action.* (San Francisco: W.H. Freeman and Company, 1979). p. 10.

[25]Greenawalt, p. 20.

The policy of national commitment to nondiscrimination established in the mid-1960s was broadly understood to encompass the eradication of intentional and overt discriminatory practices against minorities and the elimination of laws and legally sanctioned traditions and practices that resulted in government classification and legislation on the basis of race.[26] The concept of a "colorblind society" was introduced and strongly supported, stating that racial categories would be both irrelevant and impermissible as classifications in law or policy.[27]One of the reasons why such a principle of nondiscrimination has historically enjoyed, and continues to enjoy, broad public support is that racial neutrality is clear, limited and closely tied to the traditional view of equal opportunity held by most Americans.[28] Under the meritocratic definition of equal opportunity pervasive in American society, the individual best able to perform the tasks required by the job, at the time in which the job is being filled, is the obvious best choice. This view of equal opportunity is apparently "fair" by its very definition and operation and yet, because of its highly individualistic nature, it fails to take into account the inherent inequity among groups by way of income, status and past discrimination. But, this form of nondiscrimination policy is highly palatable to the average citizen for it does not actually challenge his traditional manner of thinking about equal opportunity. In reality, however, what is often meant when discussing equal opportunity is something more than a fair chance to compete on the basis of one's present skills; namely, a claim that the government should afford minimally satisfactory, or equal, opportunities to develop talents and skills.[29] In fact, from the start of the Kennedy Administration in 1961, federal officials pursued race-conscious affirmative action by applying government pressure to hire members of favored minority groups, justifying the action by reference either to an explicit charge or an implicit perception of discrimination, which was defined as racial imbalance in the work force.[30]

To fulfill his campaign promise to improve on the civil rights record of the Eisenhower Administration, President Kennedy chose in 1961 to revise the government contract program rather than

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[26]A.P. Sindler, *Equal Opportunity: On the Policy and Politics of Compensatory Minority Preferences*. (Washington: American Enterprise Institute for Public Policy Research, 1983). p. 3.

[27]Sindler, p. 3.

[28]*Ibid.*, p. 3.

[29]Greenawalt, p. 22.

[30]Belz, p. 18.

seek civil rights legislation.[31] Kennedy was an astute politician who, recognizing the strength of anti-civil rights sentiment among southern democrats in Congress, realized that passage of any type of aggressive civil rights legislation was problematic at best. Instead he opted to exert his power through Executive Order 10925, issued in March 1961, in which he directed employers to take "affirmative action" to ensure a "color-blind" method of hiring and promotion. Such directed "affirmative action" included the posting of notices attesting to employers' nondiscriminatory hiring practices and providing reports and statistics to the President's Committee on Equal Employment Opportunity (PCEEO). The PCEEO had been established by Executive Order 10925 and had the authority to enforce affirmative action mandates by imposing sanctions such as contract cancellation or contractor debarment. The PCEEO was also required to review and publicize statistical surveys of the federal work force which departments and agencies were directed to conduct.[32] President Kennedy stopped short, however, of requiring or even endorsing quotas supporting instead "race conscious affirmative action."

It was assumed that once society behaved in a "color blind" manner and removed racially discriminatory barriers, that minorities would surge into the job market and soon gain the equality due them. This was rather a naive view, and not surprisingly it did not occur. Thus, policy makers within government were forced to strengthen efforts at equalizing opportunity. Under the broad rubric of "affirmative action" the government stepped up efforts aimed not solely at ending discrimination but at remedying the effects of past discrimination. During the 1970s, these efforts transformed policy from nondiscrimination and equal opportunity for individuals as traditionally understood to racial preference and group proportional equality.[33] It was at this point that various methods of affirmative action started to emerge. The traditional or "nondiscriminatory" affirmative action such as wide notice of job vacancies and active recruitment of minority persons continued as a means to reduce the inequality of minorities access to potential employment caused by lack of knowledge and bad prior experiences.[34] In addition, other types of affirmative action such as special minority training and educational programs and special financial aid or

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[31] *Ibid.*, p. 18.
[32] *Ibid.*, p.19.
[33] Sindler, p. 4.
[34] *Ibid.*, p. 4.

admittance requirements, were introduced as yet another method to compensate for past discrimination and increase the ability of minorities to more effectively compete for current opportunities. Such policies were viewed by some as more aggressive yet legitimate methods to increase minority participation, while others were of the opinion that such seemingly preferential policies stifled competition and committed what was to be known today as reverse discrimination against non-minorities.

Such policies were based on a concept of justice known as compensatory justice. Simply defined, compensatory justices stands for the premise that persons who have suffered because they have been wrongly treated on the basis of some arbitrary characteristic may claim that those who wronged them should pay them back for the harm done.[35] The two main arguments from justice for favoring minority group members and redressing underrepresentation are that preferences are needed to place blacks and other minority groups in the position they would have had but for discrimination and that preferences serve the ideal of equal opportunity.[36] There is little doubt that past discrimination has placed minorities, especially blacks and Native Americans at a tactical disadvantage when it comes to representation in institutions of higher learning, specifically professional schools, and in employment. If this premise is accepted , then a more aggressive form of affirmative action for groups of individuals which is more than just a color-blind racially neutral solution is defensible as an acceptable means to finally abolish the lingering consequences of historic discrimination. This in turn calls for a new, or at least alternative view of equal opportunity which stresses groups and outcomes rather than just individuals and processes.[37] It is this idea of statistical group parity which for a time became the alternate definition of equal opportunity which has raised the greatest claim of reverse discrimination.

The redefinition of equal opportunity to include group rights and equality of result, modestly begun by the Kennedy Administration's government contract program, accelerated with the start of Title VII enforcement in 1965.[38] Ironically, the greatest impetus for change came through the Equal Employment Opportunity Commission (EEOC), which had been given such circumscribed powers that it

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[35]Greenawalt, p. 21.
[36]*Ibid.*, pp. 49-50.
[37]Sindler, pp. 7-8.
[38]Belz, p. 27.

was assumed it would be largely a symbolic agency. While the Congress had conceived that the EEOC would conduct investigations on an individual basis, given the case load this became an administrative impossibility. Instead, the commissioners, staff, and clientele groups of the EEOC agreed that discrimination should be defined as patterns of social and economic disadvantage caused by employment practices and social institutions in general, in relation to which complaint processing and case-by-case litigation were irrelevant.[39] Because of its inability to actually file suit in district court, the EEOC fell back on the practice of data gathering and holding public hearings at which patterns of discrimination were attacked. Although lacking substantive rule-making authority, EEOC advanced new principles of employment discrimination law through its power to make reasonable cause findings which could be pursued in the courts, issuing procedural regulations and filing of *amicus* briefs.[40] Therefore, despite the fact that opponents of racial preferences in Congress had made sure to deny the EEOC any direct legal enforcement authority, they woefully underestimated the persuasive power of such a visible federal commission and its influence on employers fearful of race riots and dependent on government contracts.

Another federal agency which played a major role in shaping affirmative action policy was the Office of Federal Contract Compliance (OFFC), which had the power to establish centralized procedures for federal contractors. The OFFC purposefully maintain a vague definition of contractors' affirmative action compliance, for by pushing a "results-oriented" agenda without being overly specific, it could avoid the ban on quotas posed by the "color-blind" wording of Title VII. It was pressure both from the civil rights lobby, which sought more rigorous enforcement of the contract obligation, and from critics of affirmative action, who sought to stop the trend toward race-conscious practices, which led the Johnson Administration to adopt "hard and fast" quotas instead of the strategy of coerced yet non-specific minority hiring.[41] Executive Order 11246 dealt with requiring standardized affirmative action plans signed by the contractors before federal contracts were let. It was believed that this policy would placate both the civil

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[39] *Ibid.*, p. 28.
[40] *Ibid.*, p. 29.
[41] *Ibid.*, p. 31.

rights lobby without antagonizing organized labor who viewed such affirmative action policies as reverse discrimination.

It was this racially charged, if still covert, practice of demanding racial preferences which was the legacy left by the Johnson administration to the incoming Nixon administration.[42] After four years of race riots and black power threats growing out of the civil rights movement, Nixon's election appeared to signal a return to law and order, a lessened emphasis on civil rights, and the restoration of more traditional equal rights concepts.[43] By the time of Nixon's inauguration, any consensus which may have existed in the arena of civil rights had dissolved into a strictly bi-partisan issue. The Democratic leadership was firmly in the camp of the civil rights lobby, despite attempts to camaflouge the party's push toward racial preferences. To have taken a stronger stand would have chanced alienating the equal strong organized labor lobby and the burgeoning middle class, allies necessary to regain or even maintain political power. Surprisingly, Nixon did not sound the death knell on affirmative action. Quite to the contrary, although relaxing the push for integration of the public schools in order to maintain the support of southern whites, the Nixon administration came forward in support of strengthened employment equality policies, especially in the construction industry. It was during this period of time that sit-asides came into use as a method to remedy the history of discrimination against minorities. The Nixon administration held that it could require affirmative action plans going beyond the requirements of Title VII, provided they were aimed at the purposes of the law: eliminating discriminatory practices and promoting employment equality for blacks.[44]

President Ronald Reagan rode into office on a platform firmly condemning the idea of quotas or racial preferences as a method to promote equal opportunity. The rhetoric, however, proved to be far more aggressive than the actual policies implemented. Although Reagan had the power to unilaterally alter or abolish affirmative action programs established under Johnson's Executive Order 11246, such was not done. Instead of consistently opposing race-conscious affirmative action throughout the government, the

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[42]During this time, the Office of Education, in defiance of the common color-blind interpretation of Title VII of the Civil Rights Act of 1964, had openly required racially balanced integration of the public schools. Consequently, it was not only in the employment context where the concept of racial preferences had overtly or covertly, gained a substantial foothold.

[43]Belz, p. 34.

[44]*Ibid.*, p. 36.

Reagan administration tried to limit its excesses and make it more politically and administratively palatable.[45] It was through the appointment of William Bradford Reynolds, who was openly intent upon rolling back advances in civil rights, as Assistant Attorney General of Civil Rights, that it became increasingly clear that Reagan did indeed desire a return to a more traditional view of equal opportunity and white supremacy. Assistant Attorney General Reynolds quickly went on record as opposing quotas or any use of a statistical formula which would, in essence, provide relief to non-victims of discrimination because of the minority group to which they may belong. Such preferential treatment would go against the traditional idea of compensatory justice used to make an actual victim of discrimination whole. Under the leadership of Assistant Attorney General Reynolds, however, the Justice Department did embrace the theory of disparate impact.

The appointment of Clarence Thomas, a social traditionalist, as head of the EEOC in 1982 witnessed the dawn of a new course for the agency. Thomas set the goals of the EEOC toward law enforcement rather than toward formal or informal rule making, for he disagreed with the method of operation used by the EEOC in the late 1970s. He moved away from group actions and pursued in greater number relief for individual victims of discrimination. By the time of President Reagan's reelection, the EEOC had shifted to an anti-quota posture. In November of 1984, Chairman Thomas announced support of the concept of relief only for identifiable victims of discrimination. Further indications of a return to individual rights and equal opportunity principles were the elimination of a separate administrative unit for bringing charges of systemic constitutional discrimination based solely on statistics, the assignment of pattern or practice suits to the agency's trial division, greater emphasis on litigation, and less reliance generally on statistics to prove discrimination.[46]

Largely because of the amount of attention given the anti-quota posture of the Attorney General's Office and the change from group to individual actions at EEOC, it often gets overlooked that the Reagan administration did much more protecting of the status quo then actual reforming civil rights. Observing that by the 1980s the majority of corporations had institutionalized the concept of affirmative as part of the

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[45] *Ibid.*, p. 183.
[46] *Ibid.*, p. 189.

corporate culture, the Reagan administration did little more than rationalize the use of affirmative action, thereby legitimizing and strengthening the underlying policy. The business community had come to the realization that it was actually better for business to conform to affirmative action procedures both for the public relations boost of appearing pro civil rights, and to avoid extremely costly litigation. Strictly on pragmatic grounds, moreover, the increasing number of minorities and women entering the work force led businesses to accept affirmative action. Goals and timetables were also justified as good for business for idealistic social reasons. Corporate equal employment opportunity officers and executives stated that affirmative action expanded the pool of available talent and led to increased productivity.[47]

At this point the argument comes around full circle to the social policy questions which first confronted the framers of the Thirteenth, Fourteenth and Fifteenth Amendments to the Federal Constitution directly after the Civil War. Legislators at all level of government must determine how far the law should be used to accomplish the purposes they believe are socially justifiable.[48] Is it socially justifiable to provide, through federal and/or state legislation, preferences to those individuals who have suffered unjustified and arbitrary discrimination in the past in order that those individuals may finally escape the detrimental effects of that discrimination which exist in the present? Because of the basic values and interest which are inherent in this question, the controversy surrounding racial preferences will not soon or easily disappear regardless of attempts by legislatures, courts or institutions. The reality of situation is that, although Congress may set policy through the legislation it passes, and the Executive may provide a policy agenda through lobbying efforts and executive orders, the final arbitar of social policy is the Court as it interprets those statutes and policies in the name of judicial review.

AFFIRMATIVE ACTION POLICY IN THE COURTS: JUDICIAL REALITY

Legislators were not the only policy makers caught off-guard at the rapid rise of equal opportunity issues. The concept of racial preferences included in more aggressive affirmative action policies lacked any concrete judicial precedent on which to base its claims, justification therefore laying instead between

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[47]*Ibid.*, p. 197.

[48]Greenawalt, pp. 3-4.

the lines of the United States Constitution. Judicial pronouncements on affirmative action, both as a concept and as a set of operating programs, lagged behind the arising controversy. This caused uncertainty about what was constitutionally permissible or impermissible in the generic name of affirmative action thereby intensifying public conflict over the appropriateness of the policy.[49]

The first case to make a significant impact on the area of racial discrimination was the 1954 decision in *Brown v Board of Education*[50] where the Court unequivocally ruled that school segregation was in violation of the Equal Protection Clause thus patently unconstitutional. What the Court did not do in its original decision was to elaborate on how the principle of unconstitutionality was to be enforced. The Court did not have the authority to enforce its pronouncement so it delegated such authority to the individual federal courts in a second case commonly referred to as *Brown II*.[51] It was in *Brown II* that the federal courts were directed to "take such proceedings and enter such orders and decrees . . . as are necessary and proper" to secure the admissions of blacks "to public schools on a racially nondiscriminatory basis with all deliberate speed."[52] While this decentralized method of enforcement left the initial responsibility to the individual school districts to implement plans to remove all vestiges of segregation, the federal courts were left with the authority and jurisdiction to determine whether the local districts were making a good faith attempt at compliance. Unfortunately, because of the use of the phrase "with all deliberate speed", which would seem to be a oxymoron, large portions of the South interpreted *Brown II* to

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[49]Sindler, p.1.

[50]*Brown v Board of Education*, 347 U.S. 483 (1954). *Brown* was actually a consolidation of several cases from the States of Kansas (*Brown v Board of Education*), South Carolina (*Briggs v Elliott*), Virginia (*Davis et al. v County School Board of Prince Edward County Virginia*), and Delaware (*Gebhart et al. v Belton et al.*), which all shared a common legal question. The plaintiffs contended that segregated public schools were not "equal" and could not be made "equal," and hence deprived them of the equal protection of the laws. The Court agreed stating that "We must look . . . to the effect of segregation itself on public education." 347 U.S. at 492. The Court went on , "To separate them [children in grade and high schools] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." 347 U.S. at 494. The Court concluded that "in the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal." 347 U.S. at 495.

[51]*Brown v Board of Education*, 349 U.S. 294 (1955). Also commonly referred to as *Brown II*, this case attempted to set up a method of enforcing the Court's original decision. The cases were remanded to District Courts to take such proceedings and enter such orders and decrees consistent with the opinion so as to effectuate desegregation with "all deliberate speed."

[52]349 U.S. at 301.

sanction an indefinite delay in compliance; a stance which it maintained for approximately ten years until the Court stepped in once again, this time to take a more active role in enforcing its orders for desegregation.

Two cases which were key in the Court's stepped-up enforcement of its desegregation mandate were *Green v County School Board*[53] and *Swann v Charlotte-Mecklenburg Board of Education.*[54] By the time of the 1968 decision in *Green*, the Court had totally lost patience with the continued calculated delays

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[53]*Green v County School Board*, 391 U.S. 430 (1968). The respondent school board operated two schools, one on the east side and one on the west side of the county. The black population, which accounted for about one-half the county's population was distributed throughout the county. Even after the Virginia constitutional provisions requiring racial segregation were declared unconstitutional, the school board continued segregated operation of the schools. Once this law suit was filed, the board adopted a "freedom-of-choice" plan for desegregating the schools. The plan permitted students to choose annually between the two schools with some restrictions by grade level. The plan was approved by the District Court. During the plan's three years of operation, no white student chose to transfer to the all-black school and 85% of the black students continued to attend the all black school. The board held that "The burden is on a school board to provide a plan that promises realistically to work *now*, and a plan that at this late date fails to provide meaningful assurance of prompt and effective disestablishment of a dual system is intolerable." 391 U.S. at 438-39. The Court noted that "The pattern of separate "white" and "Negro" schools in the New Kent County school system established under compulsion of state laws is precisely the pattern of segregation to which *Brown I* and *Brown II* were particularly addressed, and which *Brown I* declared unconstitutionally denied Negro school children equal protection of the laws. 391 U.S. at 435. Mere "deliberate speed" was no longer fast enough. The Court had run out of patience and was looking for immediate results.

[54]*Swann v Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971). The Charlotte-Mecklenburg school system had more than 84,000 students in 107 schools. Approximately 29% of the pupils were black, about half of whom attended 21 schools which were at least 99% black. A desegregation plan had been approved by the District Court in 1965. Based on the decision in *Green v County School Board*, 391 U.S. 430, Swann petitioned for further relief. In April 1969 the District Court ordered the school board to provide a plan for faculty and student desegregation. Proposed plans were accepted by the court in June and August 1969 on an interim basis only, and the board was ordered to file a third plan by November 1969. In December 1969 the District Court held that the board's submission was unacceptable and appointed an expert in education administration to prepare a desegregation plan. On February 5, 1970 the District Court adopted the board plan, as modified by the expert, for the junior and senior high schools. The court rejected the board elementary school plan and adopted the expert's plan as presented. The Supreme Court established the principle that "In default by the school authorities of their affirmative obligation to proffer acceptable remedies, the district courts have broad power to fashion remedies that will assure unitary school systems." 402 U.S. at 16. Further, "The Constitution does not prohibit district courts from using their equity power to order assignment of teachers to achieve a particular degree of faculty desegregation." 402 U.S. at 19-20. Regarding the issue of student assignment, the Court held that racial quotas are allowed but not mandated, that one-race schools do not, by themselves, denote a system that still practices segregation by law but should be scrutinized by the court to insure that the racial composition does not result from present or past discrimination, that majority-to-minority transfer is a viable option in a desegregation plan including the use of busing, and that a student assignment plan is not acceptable merely because it appears to be neutral, for such a plan may fail to counteract the continuing effects of past school segregation. 402 U.S. at 22-31.

in desegregating local school districts. Plans which promised to effectuate desegregation at some time in the future were no longer going to be allowed. The Court stated "The burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work *now*."[55] Also in *Green*, which was the strongest statement by the Court on the issue of racial discrimination since *Brown II*, the Court spoke of the "affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch"[56], a statement which could be considered a precursor of the changing policy from the more traditional "nondiscriminatory" affirmative action to a more aggressive approach to remediating past discrimination.

The far-reaching *Green* decision, the culmination of the Warren Court jurisprudence on school segregation, led directly to the Burger Court's most important decision on the subject.[57] Two important points were drawn in *Swann*; the approval of ratios to combat the effects of discrimination and the use of busing for the sole purpose of desegregation. The Court espoused an extremely broad statement of remedial power for the court in desegregation cases, "Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies."[58]

When *Green* and *Swann* are viewed together, it becomes apparent that the Court had become much more proactive in the area of assuring the dismantling of racially discriminatory practices. While *Brown I* had forbidden segregation, and *Brown II* had delegated some enforcement powers to the federal courts, *Green* and *Swann* increased the Court's delegation of remedial power in racial discrimination cases far beyond the original simple prohibition of such behavior. Affirmative action to immediately end discriminatory practices was now mandated of local districts, the absence of which would cause the courts to step in and take control of just that. In short, the court was moving from a policy of passive color-blindness to active promotion of an atmosphere of remediation for past discrimination. Moreover, the

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[55]391 U.S. at 439.

[56]*Id.* at 437-38.

[57]Bernard Schwartz, *Behind Bakke: Affirmative Action and the Supreme Court.* (New York: New York University Press, 1988). p.29.

[58]402 U.S. at 15.

Court made it clear that the remedial power held by the local school district to combat discrimination and the effect of discrimination within its own district was far greater than that held by the federal courts, and could include the use of ratios. The Court in *Swann* stated, "School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities."[59] This concept was to come under attack in subsequent Supreme Court cases.

The issue of racial preferences in institutions of higher education was brought before the Court in three separate cases between 1974 and 1978. The first of these cases, *DeFunis v Odegaard*[60] dealt with racial preference in admissions to law school. The case was ultimately ruled moot because of the fact that the plaintiff had subsequently been admitted and had finished his course of law study prior to the rendering of the decision, therefore it was never adjudicated on its merits. A second case dealing with racial preference, *United Jewish Organization v Carey*[61] was decided in 1977. In *UJO* the Court upheld a lower court decision which allowed a reapportionment plan which was instituted for the specific purpose of achieving a better racial balance between whites and nonwhites in various political districts. Once again race was allowed to be taken into consideration for the broader goal of eliminating a discriminatory situation. As was stated by Justice Brennen, "The use of race was not insulting or invidious and therefore not improper . . .The redistricting therefore was upheld as a legitimate remedial step. . ."[62]

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[59]402 U.S. at 16.

[60]*DeFunis v Odegaard*, 416 U.S. 312 (1974). The plaintiff, Marco DeFunis, had applied for admission to the University of Washington law school but had been denied even though 36 minority applicants, whose averages were below DeFunis' and in fact were so low that they would have been summarily rejected if they had been white, were accepted into the law program. DeFunis brought suit for injunctive relief, claiming that the school's admissions policy racially discriminated against him in violation of the Equal Protection Clause of the Fourteenth Amendment. The trial court ordered him admitted in 1971. The Washington Supreme Court reversed, holding that the admissions policy was not unconstitutional. By the time the case reached a hearing in front of the U.S. Supreme Court, DeFunis had already registered for his final quarter of law school. The Court held that because DeFunis would complete law school at the end of the term regardless of any decision the Court might reach on the merits, that the Court was forestalled from deciding the case on the merits and it was declared moot.

[61]*United Jewish Organization v Carey*, 430 U.S. 144 (1977).

[62]Schwartz, p. 35.

The final, and perhaps best known, of these three cases was the landmark case of *Regents of the University of California v Bakke*.[63] Contrary to the myth which is propagated by some, *Bakke* did not outlaw the use of racial preferences, but rather declared such inherently suspect thus requiring a review of "strict scrutiny" and a showing of some actual past discriminatory behavior on the part of the institution. In a 5-4 decision, about which six separate opinions were written, Justice Powell announced for the Court that "Racial and ethnic classifications of any sort are inherently suspect and call for the most exacting judicial scrutiny. While the goal of achieving a diverse student body is sufficiently compelling to justify consideration of race in admissions decisions under some circumstances, petitioner's special admissions program, which forecloses consideration to persons like respondent, is unnecessary to the achievement of this compelling goal and therefore invalid under the Equal Protection Clause."[64] Citing judicial precedent the Court states that "the guarantees of the Fourteenth Amendment extend to all persons. Its language is explicit . . . The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal."[65] The Court went on to discuss the constitutional history of racial and ethnic distinctions, admitting that the Court's initial view of the Fourteenth Amendment was "that its one

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[63] *Regents of the University of California v Bakke*, 438 U.S. 265 (1978). The case dealt with a white male whose application to medical school at the University of California Davis was rejected. The medical school had two admissions programs for the entering class of 100 students - the regular admissions program and the special admissions program. The regular admissions program was the method by which white applicants, and any minority applicants that so desired, could be admitted to medical school. The special admissions program were for those individuals who had been classified as disadvantaged minorities. Applications were preliminary screened for submission to the regular admissions committee. Individuals from the special admissions programs were recommended to the regular admissions committee until 16 special admission selections had been made. During a four-year period 63 minority students were admitted to Davis under the special program and 44 under the general program. No disadvantaged whites were admitted under the special program, though many applied. Bakke applied twice and was twice denied admittance even though his final "score" on the application procedure was higher then special applicants who were admitted through the dual admissions process. After his second rejection, Bakke filed an action in state court for mandatory, injunctive, and declaratory relief to compel his admission to Davis, alleging that the special admissions program operated to exclude him on the basis of his race in violation of the Equal Protection Clause of the Fourteenth Amendment, and provisions of the California Constitution, and Section 601 of Title VI of the Civil Rights Act of 1964, which provided, *inter alia*, that no person shall on the ground of race or color be excluded from participating in any program receiving federal financial assistance.

[64] *Regents of the University of California v Bakke*, 98 S.Ct. at 2747

[65] *Id.* at 2747-48.

pervading purpose was the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised dominion over him."[66] Justice Powell described how the Equal Protection Clause was "virtually strangled in infancy by post-civil-war judicial reactionism"[67]and while it lay fallow over the subsequent decades, that the Due Process Clause of the Fourteenth Amendment, although never intended to be the cornerstone of the legislation, "flourished as the cornerstone in the Court's defense of property and liberty of contract."[68]

Many opponents of aggressive affirmative action hang their hats on the Court's statement that "Nothing in the Constitution supports the notion that individuals may be asked to suffer otherwise impermissible burdens in order to enhance the societal standing of their ethnic groups. Second preferential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth. Third, there is a measure of inequity in forcing innocent persons . . . to bear the burdens of redressing grievances not of their making."[69] Though this is indeed strong language, it does not say anything not already espoused by the Court in one form or another. The Court has traditionally held that constitutional rights, in this case rights under the Equal Protection Clause, are extremely strong and compelling but they are not absolute. Given a sufficient compelling state interest, the state does have the power to limit such rights. If, under strict scrutiny, a compelling state interest can be shown and the proposed policy or behavior is narrowly drawn so as to specifically provide for that state interest, then it no longer is considered an "impermissible burden" forbidden by the Constitution. What is also seen in this statement by Justice Powell on behalf of the Court, is the traditional meritocratic view - the Horatio Alger Myth - which is so popular in American society. There is no mention of group dynamics, or that in certain given situations measuring by individual worth is not valid. Moreover, the disadvantaged position forced on certain minority groups because of past illegal discrimination is not any more of their making than the requirement

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[66] *Id.* at 2748-49.
[67] *Id.* at 2749.
[68] *Id.* at 2749.
[69] *Id.* at 2752.

that alleged "innocent" individuals be required to bear the burdens of redressing grievances not of their making. To coin an old phrase, two wrongs do not make a right. The simple fact of the matter is that *Bakke* did not outlaw racial preferences, rather it required strict scrutiny be applied to any policy or statute in which race was a component because race is a suspect class. This is not a new philosophy for the Court to follow.[70]

While education is one area in which the Supreme Court has placed clarifications and restrictions on the Equal Protection Clause and anti-discriminatory policies, another major area is employment. One of the first cases dealing with discriminatory employment practices was *Griggs et. al. v Duke Power Co.*[71] from which the concept of "business necessity" is derived. This case also dispels the myth that the Civil Rights Act of 1964 and the resulting affirmative actions plans require that individual employers hire incompetent employees simply because those individuals are members of a protected class. "The [Civil Rights] Act [of 1964] does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preferences for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by

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[70]Perhaps the best summary of the true meaning of *Bakke* is contained in the opinion of Justice Brennan, Justice White, Justice Marshall, and Justice Blackmun, concurring in part and dissenting in part: "The Court today, in reversing in part the judgment of the Supreme Court of California, affirms the constitutional power of Federal and State Governments to act affirmatively to achieve equal opportunity for all. The difficulty of the issue presented - whether government may use race-conscious programs to redress the continuing effects of past discrimination - and the mature consideration which each of our Brethren has brought to it have resulted in many opinions, no single one speaking for the Court. But this should not and must not mask the central meaning of today's opinions: Government may take race into account when it acts not to demean or insult any racial group, but to remedy disadvantages cast on minorities by past racial prejudice, at least when appropriate findings have been made by judicial, legislative, or administrative bodies with competence to act in this area." 98 S.Ct. at 2765-66. It must always be remembered, that the legislature is the appropriate body to set policy. The control on the legislature is that they are popularly elected and can be turned out of office should they no longer represent the electorate. As the much as the Supreme Court desires to and does establish policy, it is not its function to directly contradict any policy appropriately set by the legislature within the bounds of the legislature's power.

[71]*Griggs et. al. v Duke Power Co.* 401 U.S. 424 (1971). Black employees at Duke Power Co. brought this action pursuant to Title VII of the Civil Rights Act of 1964, challenging the employer's requirement of a high school diploma or passing of intelligence tests as a condition of employment in or transfer to jobs at the plant. The District Court found that prior to July 2, 1965, the effective date of the Civil Rights Act of 1964, the Company openly discriminated on the basis of race in the hiring and assigning of employees at its Dan River Plant. 401 U.S. at 427. Once that could not longer be done, the Company instituted policies which were not related at the ability to do the job, but were used as a method to continue to exclude blacks from higher paying jobs within the company.

Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification."[72] If you look at the intent of this statement written in 1971 and at the statement in *Bakke* in 1978, you will see that they are very similar; further evidence that *Bakke* is not as revolutionary as some would have the pubic believe.

Under the decision in *Griggs*, the purpose of Title VII of the Civil Rights Act of 1964 is to ensure that individuals are hired on the basis of job qualifications, not on the basis of race. The Act looks at consequences, not just motivations. A practice implemented with no discriminatory intent will still not withstand judicial scrutiny if the employment procedures or testing mechanisms are unrelated to measuring job capability. The Court went on to state that any type of discrimination, not only overt but also that "covert" discrimination which appears neutral on its face but is discriminatory in practice, is forbidden. "The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited."[73] This case is an example of the "color-blind" brand of affirmative action noted earlier, the type of affirmative action which is most easily accepted by the majority of the population. The Court was not stating that Duke Power Company do anything to actually remediate past discrimination, but rather that it refrain from standing in the way of what should be a natural flow of competent minorities into jobs throughout the company.

Two major issues under Title VII of the Civil Rights Act of 1964 as amended by the Equal Employment Opportunity Act of 1972 were raised in the 1975 case of *Albemarle Paper Co. et. al. v Moody et. al.*[74]:

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[72]401 U.S. at 430-31.

[73]*Id.* at 431.

[74]*Albemarle Paper Co. et. al. v Moody et. al.* 422 U.S. 405 (1975). The case centered around the dissatisfaction of black employees regarding Albemarle Paper Company's seniority system, program of employment testing and deserved back pay at two plants in North Carolina. The trial court found that the employer had strictly segregated the plant's departmental lines of progression prior to January 1, 1964, reserving the higher paying and more skilled lines for whites. The racial identifiability of whole lines of progression persisted until 1968, when the lines were reorganized under a new collective-bargaining agreement. This reorganization essentially 'locked' in the blacks into lower paying job classifications. The formerly "Negro" lines of progression had been merely tacked on to the bottom of the formerly "white" lines, and promotions, demotions, and layoffs continued to be governed - where skills were "relatively

1. When employees or applicants for employment have lost the opportunity to earn wages because an employer has engaged in an unlawful discriminatory employment practice, what standards should a federal district court follow in deciding whether to award or deny backpay?

2. What must an employer show to establish the pre-employment tests racially discriminatory in effect, though not in intent, are sufficiently "job related" to survive challenge under Title VII?

In deciding the first question, the Court turned to the statement in *Griggs* which stated that the primary objective of Title VII of the Civil Rights Act of 1964 was "to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees."[75] It was the belief of the Court that backpay had an obvious connection to the prophylactic purpose of Title VII as described in *Griggs*. In addition, the Court turned to basic common law elements of equity, after stating that the Congress, in passing Title VII, had armed the courts with equitable power to "make whole" the victim of discrimination. The backpay provision of Title VII was expressly modeled on the backpay provision of the National Labor Relations Act, which provides for "making workers whole for losses suffered on account of an unfair labor practice. . ."[76] In light of this information, the Court held that ". . . given a finding of unlawful discrimination, backpay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of

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equal" - by a system of "job seniority." Because of the plant's previous history of overt segregation, only whites had seniority in the higher job categories. 422 U.S. at 409.

[75]422 U.S. at 417.

[76]Section 10(c) of the NLRA, 49 Stat. 454, as amended, 29 U.S.C. §160(c), provides that when the Labor Board has found that a person has committed an "unfair labor practice," the Board "shall issue" an order "requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter." The backpay provision of Title VII provides that when the court has found "an unlawful employment practice," it "may enjoin" the practice "and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . " 42 U.S.C. §2000c-5(g) (1970 ed., Supp. III). The framers of Title VII stated that they were using the NLRA provision as a model. 110 Cong. Rec. 6549 (1964) (remarks by Sen. Humphrey); *id.*, at 7214 (interpretative memorandum by Sens. Clark and Case.) In early versions of the Title VII provision on remedies, it was stated that a court "may" issue injunctions, but "shall" order appropriate affirmative action. This anomaly was removed by Substitute Amendment No. 656, 110 Cong. Rec. 12814, 12819 (1964).

eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination."[77]

In other words, after discriminatory behavior, if an employer desires not to give backpay, they must advance sufficient reasons in an articulate manner which provide an equitable argument against such compensation. Under Title VII, the mere absence of bad faith is not sufficient to tip the scales in the favor of the employer. If back pay was awarded only when discriminatory intent, or bad faith, could be shown then the remedy would be for moral turpitude rather than equitable compensation to make the worker whole and that is simply not the way in which Title VII was drafted. The worker's injury is no less real simply because there existed no bad faith on the part of the employer.

Regarding the second question, the Court decided that given the fact that the employer had been amending its departmental organization and the use made of the tests in question, that a decision on such should be sent back to the District Court to fashion the necessary relief. The Court did, however, give guidance to the lower court be reiterating its stand in *Griggs* regarding the business necessity of the tests. Basically, discriminatory tests are impermissible unless shown, by professionally acceptable methods, to be "predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated."[78] The employer in this case had failed to show such correlation.

With the decision in *Albemarle*, the Court continued to set civil rights policy, however, it remained in a societally acceptable range of solutions. Even with the award of backpay to minority

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[77]422 U.S. at 421.

[78]EEOC Guidelines, 29 CFR §1607.4(c). Measured against the Guidelines, the employer's validation study was materially defective in several respects: (1) Tests were used in jobs other than those for which it had been professionally validated even when there were significant differences between the jobs studied and the jobs in which the tests were applied; (2) The study compared test scores with subjective supervisorial rankings when the Guidelines allow use of supervisorial rankings in test validation only with great care which was not evident in the instant case; (3) The employer's study focused, in most cases, on job groups near the top of the various lines of progression. The fact that the best of those employees working near the top of a line of progression score well on a test does not necessarily mean that that test is a permissible measure of the minimal qualifications of new workers entering lower level jobs; (4) The employer's validation study dealt only with job-experienced, white workers; but the tests themselves were given to new job applicants, who are younger, largely inexperienced, and in many instances nonwhite.

employees who had suffered illegal discrimination, the Court was dealing with an employer which had overtly discriminated at an earlier point of time. This fact, the showing of actual past discrimination, distinguishes this case from *Bakke* where the Court could find to evidence of actual past discrimination in admissions policies, without arriving at an inconsistent holding. Unlike the statement of the Court in *Bakke* that affirmative action policies should not punish individuals who, themselves, were innocent of any discriminatory behavior, the Court in *Albemarle* was using the traditional equitable power of the courts to make a damaged person whole. Who could argue with that?

The more aggressive affirmative action tool of racial quotas was the topic of litigation of the 1977 case of *Hazelwood School District et. al. v United States.*[79] Basically because of a lack of an adequate defense on behalf of the school district, judgment was entered for the government at the appellate level and the District Court was directed to order the school district to cease discriminating on the basis of race or color in the hiring of teachers, promulgate accurate job descriptions and hiring criteria, recruit black and white applicants on an equal basis, give preference in filling vacancies to the 16 discriminatorily rejected applicants, make appropriate backpay awards, and submit periodic reports to the Government on its progress in hiring qualified black teachers. The District Court's order went past mandating a "color-blind" policy and required affirmative action in the form of racial preferences.

In reviewing the actions of the lower courts, the Supreme Court agreed that statistics can be an important source of proof in employment discrimination. If the percentage of minorities is unusually low

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[79]*Hazelwood School District et. al. v United States* 433 U.S. 299 (1977). The United States brought this action against the Hazelwood, Missouri, School District, located in St. Louis County, and various officials alleging that they were engaged in a "pattern or practice" of teacher employment discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended, which became applicable to the school district as public employers on March 24, 1972. Hazelwood had been formed from 13 rural school districts between 1949 and 1951 by a process of annexation. By the 1972-73 school year only 2% of the student population was black. The hiring process employed by the school districts prior to the late 1960s was simply to send any interested person an application, keep those applications on file and then when a vacancy occurred all applicants were notified. Because of the increase of applications by the late 1960s and early 1970s this method became unworkable so the school district's personnel office began selecting 3 to 10 applicants to interview at the school where there was a vacancy. The screening was not intensive and usually the individuals with the most current applications were the ones chosen. Any recruitment done was at predominately white colleges and universities in Missouri and bordering states. Predominately black colleges in Missouri were largely ignored. The first black teacher was hired in 1969. By 1973, 22 of 1,231 teachers, or approximately 1.7% were black.

that is prima facia evidence of underrepresentation which shifts the burden of proof to the employer to explain why such underrepresentation is not an effect of discriminatory conduct. "Absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired."[80] The Court went on to state, however, that since racial discrimination by public employers was not made illegal under Title VII until March 24, 1972, that when attempting to establish a discriminatory employment practice, only those employment decisions made after that date should be considered. "A public employer who from that date forward made all its employment decisions in a wholly nondiscriminatory way would not violate Title VII even if it had formerly maintained an all-white work force by purposefully excluding Negros."[81]

The first step toward racial preferences had been taken. The concern of the Court in *Hazelwood* was not whether preferences were constitutional, but rather whether the statistics used when looking at disparate impact were the correct statistics. To determine discrimination, the proper comparison was not between the composition of the student body and the teaching staff, but between the racial composition of the teaching staff and the racial composition of the qualified labor market. The idea of a preference stood unscathed. Current affirmative action policies very often take into account this type of statistical disparate impact, especially in the context of deciding where and whom to recruit.

The case of *Fullilove et. al. v Klutznick, Secretary of Commerce, et. al.*[82] dealt with a constitutional challenge to a requirement in a congressional spending program that, absent an administrative waiver, 10% of the federal funds granted for local public works projects must be used by the state or local grantee to procure services or supplies from businesses owned and controlled by members of statutorily identified minority groups (MBEs).[83] After viewing the legislative and administrative

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[80]*Teamsters v United States*, 431 U.S. at 340 as quoted in *Hazelwood School District v United States*, 433 U.S. at 307.

[81]433 U.S. at 309.

[82]*Fullilove et. al. v Klutznick, Secretary of Commerce, et al.* 448 U.S. 448 (1980).

[83]In May 1977, Congress enacted the Public Works Employment Act of 1977, Pub.L. 95-28, 91 Stat. 116, which amended the Local Public Works Capital Development and Investment Act of 1976, Pub. L. 94-369, 90 Stat. 999, 42 U.S.C. §6701 *et seq.* The 1977 amendments authorized an additional $4 billion appropriation for federal grants to be made by the Secretary of Commerce, acting through the Economic

background of the 1977 Act, and the legislative objectives of the MBE provision, Chief Justice Burger, joined by Justices White and Powell, concluded that the MBE provision, on its face, did not violate the constitution. The sponsor of the amendment, Representative Mitchell of Maryland, stated that the objective of the amendment was to direct funds into the minority business community, a sector of the economy sorely in need of economic stimulus but which, on the basis of past experience with Government procurement programs, could not be expected to benefit significantly from the public works program as formulated.[84] Other supporters of the MBE amendment echoed the sponsor's concern that a number of factors, difficult to isolate or quantify, seemed to impair access by minority businesses to public contracting opportunities.[85] After reviewing the floor debate and relevant reports, it is inconceivable that either Congress or the Senate was not well aware of the purpose behind the MBE prior to its adoption, an adoption that was well within the power of the policy making authority of the legislative branch of the federal government.

Indeed, the method used by the Court in deciding on the constitutionality of the MBE provision was two-step, starting with a determination of whether the objectives of this legislation - the decision to initiate a limited racial and ethnic preference; the specification of a minimum level for minority business participation; the identification of the minority groups that were to be encompassed by the program for the purpose of remediating past discriminatory practices within a given industry - were within the power of Congress. If it was decided that such was within the power of Congress, the second step was to determine whether the limited use of racial and ethnic criteria, in the context presented, was a constitutionally

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Development Administration (EDA), to state and local governmental entities for use in local public works projects. Section 103(f)(2) of the 1977 Act, referred to as the "minority business enterprise" or "MBE" provision, requires that: "Except to the extent that the Secretary determines otherwise, no grant shall be made under the Act for any local public works project unless the applicant gives satisfactory assurance to the Secretary that at least 10 per centum of the amount of each grant shall be expended for minority business enterprises. For purposes of this paragraph, the term 'minority business enterprise' means a business at least 50 per centum of which is owned by minority group members or, in the case of a publicly owned business, at least 51 per centum of the stock of which is owned by minority group members. For the purposes of the preceding sentence, minority group members are citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts." 91 Stat. 116, 42 U.S.C. §6705(f)(2) (1976 ed., Supp. II).

[84]123 Cong. Rec. at 5097-5098 (1977) (remarks of Rep. Mitchell).

[85]448 U.S. 461.

permissible means for achieving the congressional objectives and did not violate the equal protection component of the Due Process Clause of the Fifth Amendment.[86]

After reviewing the objectives of the MBE provision within the framework of Congressional power it was determined that such objectives were within the scope of Congress' Spending Power in that the MBE program primarily regulated state action in the use of federal funds voluntarily sought and accepted by the grantees subject to statutory and administrative conditions. The MBE participation requirement was directed at the utilization of criteria, methods, or practices thought by Congress to have the effect of defeating, or substantially impairing, access by the minority business community to public funds made available by congressional appropriations.[87]

Therefore, the only question remaining for the Court was whether the limited use of racial and ethnic criteria was a constitutionally permitted means to obtain the objectives stated above. The Court rejected off-hand the argument that Congress must act in a wholly "color-blind" fashion quoting its decision in *Swann*. It recognized the broad remedial powers of Congress, the branch of government "expressly charged by the Constitution with competence and authority to enforce equal protection guarantees."[88] A challenge to the MBE provision was also raised on the theory of reverse discrimination; that the "effect of awarding some contracts to MBE's which otherwise might be awarded to other businesses, who may themselves be innocent of any prior discriminatory actions."[89] The response of the Court was that "It is not a constitutional defect . . . that it may disappoint the expectations of nonminority firms. When effectuating a limited and properly tailored remedy to cure the effects of prior discrimination, such a "sharing of the burden" by innocent parties is not impermissible."[90]

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[86] *Id.* at 473.

[87] *Id.* at 479-480. *See* also the discussion of the scope of Congress' Spending Power in *Lau v Nichols*, 414 U.S. 563 (1974). Insofar as the MBE program pertained to the actions of a private prime contractors, including those not responsible for any violation of antidiscrimination laws, Congress could have achieved its objectives under the Commerce Clause. Insofar as the MBE program pertained to the actions of state and local grantees, Congress could have achieved its objectives by use of its power under the Fourteenth Amendment.

[88] 448 U.S. at 483.

[89] *Id.* at 484.

[90] *Id.* at 484.

In his closing statement, Chief Justice Burger, on behalf of the Court, stated that "Congress has necessary latitude to try new techniques such as the limited use of racial and ethnic criteria to accomplish remedial objectives."[91] This statement, along with the entire tenor of the decision, would seem to directly contradict both the holding and the dicta in *Bakke*, yet the Court claims that, while this opinion did not adopt, either expressly or implicitly, the formulas of analysis articulated in *Bakke*, the MBE provision would survive judicial review under either "test" articulated in that case, which was decided two years earlier. With that statement, the decision in *Bakke* was not overruled but merely distinguished and swept to the side. What the Court did accomplish with the opinion in *Fullilove*, is to continue the controversy regarding civil rights which was started with the passage of the Thirteenth Amendment and has continued to this day regarding racial preference and quotas.

With the decision in *Wygant et. al. v Jackson Board of Education et. al.*[92] concerning the modification of the district's seniority policy in order to protect minority employees in case of lay off, the Court's pendulum seems to swing back toward disallowing racial preference. After careful scrutiny of the case, however, that may not actually be true. This suit was another example of litigation claiming reverse discrimination, where nonminority employees who had been laid off challenged the retention of minority employees with less seniority and the district policy which allowed such "reverse discrimination" to occur. The District Court upheld the constitutionality of the layoff provision, holding that racial preferences granted by the Board need not be grounded on a finding of prior discrimination but were permissible under the Equal Protection Clause as an attempt to remedy societal discrimination by providing "role models" for minority schoolchildren.[93]

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[91] *Id.* at 490.

[92] *Wygant et. al. v Jackson Board of Education et. al.*, 476 U.S. 267 (1986). The suit arose out of a provision of the Collective Bargaining Agreement between the Jackson Board of Education and the Jackson Education Association which provided that if it became necessary to lay off teachers, those with the most seniority would be retained, except that at no time would there be a greater percentage of minority personnel laid off than the current percentage of minority personnel employed at the time of the layoff. Displaced nonminority teachers brought suit alleging violation of the Equal Protection Clause - a reverse discrimination theory like that employed by Bakke.

[93] The reason for the new provision in the Collective Bargaining Agreement between the Jackson Board of Education and the Jackson Education Association developed because of racial tension in the community which extended to the schools. The Board and the Union ultimately adopted a provision which would maintain a certain percentage of minority personnel, thereby insulating them from layoffs to the

Not suprisingly in reviewing this case, the Court once again affirmed that any classification on the basis of race was suspect thus must be justified by a compelling state interest, and be narrowly tailored so as to meet that interest. This is not a new concept.[94] In *Wygant*, the Court simply did not accept the role model theory advanced by the school district as justification for the policy based on racial classification. Falling back on its reasoning in *Hazelwood*, the Court reiterated the need for some proof of prior discriminatory behavior such as through statistical disparity, prior to employing such a potentially suspect classification as race. "Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy. No one doubts that there has been serious racial discrimination in this country. But as the basis for imposing discriminatory legal remedies that work against innocent people, societal discrimination is insufficient and over-expansive."[95]

Once again the Court was very careful to distinguish those cases which would seem to be in conflict with the instant decision, thereby leaving those cases intact while still being able to reach its desired decision. It should be noted that once again the Court was split, with Justice Powell announcing the judgment of the Court and delivering an opinion with which Chief Justice Burger and Justice Rhenquist joined. Justice O'Connor joined in the majority opinion in all except Part IV, while also writing her own opinion in which she concurred with the judgment and with portions of the majority opinion. Justice White also filed an opinion in which he concurred with the judgment. Justice Marshall filed a dissenting opinion, in which Justice Brennan and Justice Blackmun joined, while Justice Stevens filed his own dissenting opinion. This was not a Court of like mind. Rather it reflected the nature of society as a whole at that time on the topic of aggressive affirmative action programs which included racial preferences. In his dissent, Justice Marshall gave much greater judicial notice to the actual ongoing racial tensions facing the school district at the time of the adoption of the layoff provision, and thereby making a very convincing argument

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extent that they lacked seniority. When, in 1974, layoffs did occur, however, the school district did not comply with the bargained provision when it became evident that tenured nonminority teachers would be laid-off while minority probationary teachers were retained. The Board only began adhering to the provision after it had been successfully sued by the Union for breach of contract.

[94]*See, Fullilove v Klutznick*, 448 U.S. 448 (1980); *Palmore v Sidoti*, 466 U.S. 429 (1984); *Loving v Virginia*, 388 U.S. 1 (1967); *Graham v Richardson*, 403 U.S. 365 (1971).

[95]476 U.S. at 276.

as to the need for an aggressive affirmative action policy and the possible constitutionality of the controversial layoff provision.[96]

Just one year later, the same Court facing a promotion policy based on racial classification, concluded that, even under a strict scrutiny analysis, the one-black-for-one-white promotion requirement was permissible under the Equal Protection Clause of the Fourteenth Amendment. The question before the Court in *United States v Paradise et. al.*[97] was whether relief awarded in the form of a one-black-for-one-white promotion requirement to be applied as an interim measure to state trooper promotions in the Alabama Department of Public Safety was permissible under the Equal Protection guarantee of the Fourteenth Amendment.[98] The Court, while stating that it was well established that government bodies, including courts, may constitutionally employ racial classifications essential to remedy unlawful treatment of racial or ethnic groups subject to discrimination, it also admitted that the Court had not been consistent nor had it reached consensus on the appropriate constitutional analysis.[99] The existence of prior overtly discriminatory behavior on behalf of the Alabama State Troopers was undeniable given the record at hand. Therefore, the presence of tangibly "guilty" parties, a distinction which seems particularly important to the Court in previous decisions, was definitely shown.

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[96]"The principal state purpose supporting Article XII is the need to preserve the levels of faculty integration achieved through the affirmative hiring policy adopted in the early 1970's. Justification for the hiring policy itself is found in the turbulent history of the effort to integrate the Jackson public schools- not even mentioned in the plurality opinion - which attests to the bona fides of the Board's current employment practices. . . Testimony of both Union and school officials illustrates that the Board's obligation to integrate its faculty could not have been fulfilled meaningfully as long as layoffs continued to eliminate the last hired. In addition, qualified minority teachers from other States were reluctant to uproot their lives and move to Michigan without any promise of protection from imminent layoff. The testimony suggests that the lack of some layoff protection would have crippled the efforts to recruit minority applicants. Adjustment of the layoff hierarchy under these circumstances was a necessary corollary of an affirmative hiring policy." Marshall dissent, 476 U.S. at 303-307.

[97]*United States v Paradise et. al.* 480 U.S. 149 (1987). In 1972, upon finding that, for almost four decades, the Alabama Department of Public Safety had systematically excluded blacks from employment as state troopers in violation of the Fourteenth Amendment, the District Court issued an order imposing a hiring quota and requiring the Department to refrain from engaging in discrimination in its employment practices, including promotions. As of 1981, no black troopers had been promoted. Because of the failure of the Department of establish promotion procedures that did not have an adverse impact on blacks, the District Court ordered the promotion of one black trooper for each white trooper elevated in rank, as long as qualified black candidates were available until such time as the Department established an appropriate policy.

[98]480 U.S. at 153.

[99]*Id.* at 166.

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In reaching its determination that the policy was constitutional, the Court first examined the purposes of the court order mandating a one-for-one promotion practice. "First, the court sought to eliminate the effects of the Department's "long term, open, and pervasive" discrimination, including the absolute exclusion of blacks from its upper ranks. Second, the judge sought to ensure expeditious compliance with the 1979 and 1981 Decrees by inducing the Department to implement a promotion procedure that would not have an adverse impact on blacks. Finally, the court needed to eliminate so far as possible the effects of the Department's delay in producing such a procedure."[100] The compelling state interest needed was present. Moving on to the second prong of the balancing test - is the remedy narrowly tailored - the Court held that such was the case because such classification was necessary to remediate prior discrimination, it was flexible in application, the numerical relief ordered bore a proper relation to the percentage of nonwhites in the relevant workforce, it did not impose an unacceptable burden on innocent white promotion standards, and the court fashioning the remedy was close enough to the actual controversy that it had a good understanding of the issues and personalities involved.

Once again the judicial pendulum has swung, clung to by a splintered Court. The action of the District Court was found to be constitutional by a three member majority opinion, an opinion concurring, an opinion concurring in the judgment and three in dissent. By this point, all but three of the current Supreme Court Justices - Thomas, Kennedy and Souter - were already seated. It is not surprising that O'Connor, Rehnquist and Scalia, Justices appointed by conservative Republican administrations which were never known to be champions of the policy behind aggressive affirmative action, were the three dissents. That fact, more than anything else, is the greatest soothsayer of the future of affirmative action policy when brought to the review of the Court, than attempting to distinguish individual cases. Although suffering from occasional logic built on minutia, the Court has held fairly consistent regarding the level of scrutiny, the need for an articulated discriminatory past action, and a narrow tailoring of remedy along with the granting of great discretion to Congressional enactments and court orders on the topic of racial

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[100] *Id.* at 171-172.

classifications, preferences or quotas. The cry of reverse discrimination has not been sufficient, in and of itself, to scare the Court into a predictable outcome.

A second 1987 reverse discrimination suit *Johnson v Transportation Agency, Santa Clara County, California, et. al.*[101] was decided by the same Court, the difference being that this time the discrimination was based on gender rather than race. From the start, the Court set the stage, reminding the participants that the individual complaining, in this case Mr. Johnson, had the burden of proving that the employer's affirmative action plan was unconstitutional. Merely making the accusation was not sufficient. "Once a prima facia case that race or gender has been taken into account, however, the burden immediately shifts to the employer to articulate a nondiscriminatory rationale for its decision. The existence of an affirmative action plan provides such a rationale. If such a plan is articulated as the basis for the employer's decision, the burden shifts to the plaintiff [employee] to prove that the employer's justification is pretextual and the plan is invalid."[102]

The Court then reviewed the basis of the affirmative action plan and concluded that it was consistent with Title VII of the Civil Rights Act of 1964 in that it was a moderate, flexible, case-by-case approach to remedy the underrepresentation of women and minorities is specific occupations which had a history of segregation without unduly burdening the white male majority. It was very important to the Court that gender was but one factor in the total hiring decision. It also gave praise and encouragement for voluntary initiative in promulgating an affirmative action plan. Prior cases seemed to put a greater burden on employers who voluntarily attempted to comply with the spirit of Title VII through affirmative action plans, giving greater deference to the policy making authority of Congress and the judicial authority to

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[101] *Johnson v Transportation Agency, Santa Clara County, California, et. al.* 480 U.S. 616. In 1978, an Affirmative Action Plan for hiring and promoting minorities and women was voluntarily adopted by the employer. The plan provided that in making promotions to positions within a traditionally segregated job classification in which women had been significantly under represented, the Agency was authorized to consider as one factor the sex of a qualified applicant. The plan was intended to achieve a statistically measurable yearly improvement in hiring and promoting minorities and women in job classifications where they were underrepresented, and the long-term goal was to attain a work force whose composition reflected the proportion of minorities and women in the area labor force. In 1979 a vacancy occurred. After the screening and interviewing of eligible applicants the decision came down to a man and a woman. The woman was promoted. The man filed a complaint with EEOC claiming that he had been denied promotion on the basis of gender in violation of Title VII.

[102] 480 U.S. at 626.

order an equitable solution. Yet the Court remained fractured with Justices White, Scalia and Rhenquist in dissent, while the majority of Justices Brennan, Marshall, Blackmun, Powell, Stevens and O'Connor delivered three separate opinions; a testimony to the inherent divisive nature of the social policies underlying the legal issues.[103]

Another case dealing with potentially discriminatory hiring and promotion practices was *Wards Cove Packing Co., Inc., et. al. v Atonio et. al.*[104] The question before the Court in this case was similar to others in that it dealt with employer practices which caused an overrepresentation of minority workers in lower paid unskilled positions and an underrepresentation of the same in higher paying skilled positions. Not suprisingly, the Court quickly turned to its holdings in prior decisions such as *Griggs* and *Hazelwood* to set the scene for its decision. Using the reasoning of *Hazelwood* as a benchmark, the Court found that the "Court of Appeal's acceptance of the comparison between the racial composition of the cannery work force and that of the noncannery work force, as probative of a prima facie case of disparate impact in the

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[103] Looking at *Johnson*, one is forced to pose the question that perhaps, for the benefit of women, they should not be considered a suspect class for the purpose of affirmative action. Once a group is considered a suspect class, then any policy or procedure implemented to aid that group in overcoming past discrimination is also declared suspect and must past a test of strict scrutiny in order to survive. Perhaps the reason that women, especially white women, have faired so well under affirmative action is because policies implemented to overcome past discrimination of women were not subject to the same high level of scrutiny as those providing a racial preference, thus were more often allowed to stand and operate as intended.

[104] *Wards Cove Packing Co., Inc., et. al. v Atonio et. al.* 490 U.S. 643 (1989). The suit was filed by minority workers at two salmon canneries in Alaska claiming a violation of their rights under Title VII of the Civil Rights Act of 1964. These canneries, located in remote areas of Alaska, were in operation only during the salmon runs during the summer months. The rest of the year they sat vacant. In May or June of each year, a few weeks before the salmon runs began, workers arrived and prepared the equipment and facilities for the canning operation. Most of these workers possessed a variety of skills. When salmon runs were about to begin, the workers who would operate the cannery lines arrived, remained as long as there were fish to can, and then departed. Consequently the length of employment and the number of employees needed was highly variable. 490 U.S. 646. Jobs at the canneries were of two general types: "cannery jobs" on the cannery line, which were unskilled positions, and "noncannery jobs" which fell into a variety of classifications. Most noncannery jobs are classified as skilled positions. Cannery jobs were filled predominantly by nonwhite individuals hired through, and dispatched by, Local 37 of the International Longshoremen's and Warehousemen's Union pursuant to a hiring hall agreement. Noncannery jobs were filled predominantly by white individuals. The predominantly white noncannery workers and the predominantly nonwhite cannery employees lived in separate dormitories and ate in separate mess halls. The claims of illegal hiring and promotion practices included in the nonwhite workers' complaint included nepotism, a rehire preference, a lack of objective hiring criteria, separate hiring channels, a practice of not promoting from within, and also claimed that these practices were responsible for the racial stratification of the work force.

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selection of the latter group of workers was flawed. . ."[105] The correct statistical comparison to sustain a disparate impact argument would have been to compare the racial composition of the cannery jobs and the noncannery jobs and the racial composition of the qualified population of the relevant labor market to fill those jobs. The fact that there were not sufficient nonwhite applicants to fill temporary skilled positions in the remote areas of Alaska was definitely not the fault of the employer. It was the conclusion of the Court, therefore, that a prima facia case of discrimination had not been made by the nonwhite employees.

The Court went on the address two other issues which were contained in the question of disparate impact. First was the question of causation in a disparate impact case. Basing a claim on several "objective" employment practices alone will not suffice to make out a prima facie case of disparate impact. If one wishes to claim disparate impact, he or she must demonstrate that the disparity of which they complain is the result of one or more specific employment practices, and show that each challenged practice has had a significantly disparate impact on employment opportunities for whites and nonwhites. If this should be done, and a prima facia case is established, the burden of proof then switches to the employer to show a business justification, which is the second issue discussed by the Court. Any business justification must contain two components: first a consideration of the justifications offered, and second, the availability of alternative practices to achieve the same business ends which have less racial impact.

The Court stated that "it is generally well established that at the justification stage of such a disparate impact case, the dispositive issue is whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer."[106] At this stage the employer carries the burden of producing evidence of the business justification, while the burden of persuasion remains with the employee. If a legitimate business justification is established, the employee still has the burden of proof, and one last chance, to show that "other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate [hiring] interest(s), by so demonstrating, [employees] would prove that [employers] were using [their] tests merely as a 'pretext for discrimination."[107] The Court

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[105] 490 U.S. at 651.
[106] *Id.* at 659.
[107] *Id.* at 660.

went on to say that any alternative offered by the employee must be equally effective and cause no additional costs or burdens to the employer to be considered viable alternatives.

This decision, which threw the majority of the burden of persuasion on the employee was put forth, not surprisingly, by a split Court. Unlike previous cases, however, the split was reversed. In the instant case, Justice White wrote the opinion for the majority with Chief Justice Rehnquist, and Justices O'Connor, Scalia and Kennedy joining. In the dissent were Justices Brennan, Marshall, Stevens and Blackmun. The underlying theory had not changed. The issue of considering race in hiring decisions was not outlawed, rather it was once again forced to withstand rigorous constitutional and factual review.

In the case of *City of Richmond v J.A. Croson, Co.*[108] Chief Justice Rhenquist, along with Justices O'Connor, Scalia, Kennedy and Stevens, although not overturning *Fullilove*, held that the Minority Business Utilization Plan adopted by the City of Richmond requiring 30% of the dollar amount of each awarded city construction contract be subcontracted to MBEs, did not pass the strict scrutiny applied to any employment policy using racial preferences or quotas. Once again the Court was forced to deal with the tension inherent between the Fourteenth Amendment's guarantee of equal treatment to all citizens and the social policy promoting the use of race-based measures to ameliorate the effects of past discrimination on the opportunities allowed minority groups, the continuing struggle between the individual and the group.

To determine the scope of legislative power of city government to remediate past discriminatory behavior, the Court deftly negotiated a path directly through the two alternatives offered by *Wygant's* need for a showing of actual discrimination by the city, and *Fullilove's* allocation of a sweeping legislative power to define and attack the effects of prior discrimination. The Court first distinguishes Burger's

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[108] *City of Richmond v J.A. Croson Co.* 488 U.S. 469 (1989). On April 11, 1983 the Richmond City Council adopted the Minority Business Utilization Plan which required prime contractors to whom the city awarded construction contracts to subcontract at least 30% of the dollar amount of the contract to one or more Minority Business Enterprise. The Plan defined an MBE as a business at least 51% of which is owned and controlled by minority group members, which in turn were defined as Blacks, Spanish-speaking, Orientals, Indians, Eskimos or Aleuts. There was no direct evidence of race discrimination on the part of the city in letting contracts or any evidence that the city's prime contractors had discriminated against minority-owned subcontractors. The litigation grew out of a refusal to grant a waiver of the 30% requirement to a prime contractor because of his inability to find a qualified MBE to provide the subcontracting service. The city chose instead to rebid the entire project. The contractor, Croson, filed suit challenging the constitutionality of the ordinance.

opinion in *Fullilove* by stating that neither "strict scrutiny or any other traditional standard of equal protection review"[109] was used, opting instead to accord appropriate deference to the policy making power of Congress granted by the federal Constitution. Justice O'Connor went on to state that "Congress, unlike any State or political subdivision, has a specific constitutional mandate to enforce the dictates of the Fourteenth Amendment. The power to "enforce" may at times also include the power to define situations which *Congress* determines threaten principles of equality and to adopt prophylactic rules to deal with those situations."[110] This is an important statement to keep in mind for later discussions of federal congressional action regarding its intent for the future of affirmative action. Recognizing the fundamental shift in power which occurred with the adoption of the Thirteenth, Fourteenth and Fifteenth Amendments, the Court went on to say, "The Civil War Amendments themselves worked a dramatic change in the balance between congressional and state power over matters of race. . . . They were intended to be, what they really are, limitations of the powers of the States and enlargements of the power of Congress."[111] By limiting the states powers to enact remedial legislation, the Court confirmed the intent of the framers of the Civil War Amendments to shift, to the federal government, the role of protector and advocate of civil rights and equality.

After carefully distinguishing the ruling in *Wygant*, the Court went on to state that, "if the city could show that it had essentially become a "passive participant" in a system of racial exclusion practiced by elements of the local construction industry, we think it clear that the city could take affirmative steps to dismantle such a system. . . . It is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice."[112] Furthermore, the Court reiterating the need for "strict scrutiny to "smoke out" illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool. . . and to ensure that the means chosen "fit" this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate

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[109]488 U.S. at 487.
[110]*Id.* at 490.
[111]*Id.* at 490.
[112]*Id.* at 492.

racial prejudice or stereotype."[113] While the Court acknowledge the existence of past discrimination in the construction industry, it did not feel that such an argument was sufficiently compelling to warrant the use of quotas in the awarding of contracts, falling back on the individualist argument put forth in *Bakke*. The Court was unable to find any specifically identifiable discrimination against blacks in the Richmond construction industry, and absolutely no evidence of past discrimination against Spanish-speaking, Oriental, Native American, Eskimo or Aluet individuals. Therefore the random inclusion of racial groups that, as a practical matter, may never have suffered from discrimination in the construction industry in Richmond doomed the city's remedial actions to impermissability under the Constitution as failing to be "narrowly tailored" to pass muster under strict scrutiny.

On the topic of being "narrowly tailored" the Court observed further flaws. First, there did not appear to be any consideration by the city of using race-neutral means to increase minority business participation in city contracting. Secondly, the quota seemed to have no goal other than outright racial balancing. "It rest[ed] upon the "completely unrealistic" assumption that minorities [would] choose a particular trade in lockstep proportion to their representation in the local population."[114] The Court suggested that such a policy was mandated more for administrative convenience rather than any true desire to remediate past actual discrimination.

In closing the Court was quick to state that the opinion in no way precluded a state or local entity from taking action to rectify the effects of identified discrimination within its jurisdiction. "Where there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality's prime contractors, an inference of discriminatory exclusion could arise. . . .In the extreme case, some form of narrowly tailored racial preference might be necessary to break down patterns of deliberate exclusion."[115] The Court went on to say that local government also had the power to deal with individual instances of racially motivated refusals to employ minority contractors by justifiably penalizing the

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[113] *Id.* at 493.
[114] *Id.* at 507.
[115] *Id.* at 509

discriminator and providing appropriate relief to the victim of such discrimination. Moreover, "even in the absence of evidence of discrimination, the city has at its disposal a whole array of race-neutral devices to increase the accessibility of city contracting opportunities to small entrepreneurs of all races"[116]such as simplification of bidding procedures, relaxation of bonding requirements, and training and financial aid for disadvantaged entrepreneurs of all races.

Consequently, although the Court in *Croson* did not forbid the use of affirmative action plans, it clearly showed that the Court was much more comfortable with the use of "color-blind" nondiscriminatory methods of remediating past discrimination rather than those aggressive, racially preferential methods which had grown in popularity with certain segments of the population during the late 1960s and 1970s. While *Croson* addressed the action taken by state and local governments, the 1995 case of *Adarand v Pena*[117] made uniform the standard of review of all affirmative action plans. Once again a 5-4 split Court delivered the opinion making the statement that all federal, state, and local race-based programs are subject to strict scrutiny which means proof of a narrowly-tailored solution to support a compelling state interest. The forcing of all affirmative action plans, regardless of body of origin to rise to the "strict scrutiny" level of judicial review was a significant theoretical shift for the Court for what this pronouncement did was to put forward a presumption that all affirmative action plans were unconstitutional unless proven, under strict scrutiny, to be otherwise. No longer were plans forwarded by the federal government to be given additional latitude and presumed constitutional under the policy making power of the legislative function of government.

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[116]*Id.* at 509

[117]*Adarand v Pena*, 115 S.Ct. 2097 (1995). In 1989, a division of the U.S. Department of Transportation awarded Mountain Gravel and Construction Company a highway construction project in Colorado. (*Id.* at 2105) Under federal regulation, the construction company was required to use 10% of the federal funds received to employ small businesses which were owned and controlled by socially and economically disadvantaged individuals and in fact would receive an incentive if a subcontract was granted to one of these small business. Following this regulation, the construction company subcontracted with Gonzales Construction Company, which had been certified as a small business that was socially or economically disadvantaged, despite the fact that Adarand Construction had submitted a lower bid. Adarand filed suit claiming it was denied equal protection by such race-based subcontract clauses which gave a financial incentive to general contractors to hire economically or socially disadvantaged subcontractors. (*Id.* at 2105) The lower courts found for the general contractor and against Adarand after using an intermediate level of scrutiny to review the federal action.

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This decision required Congress to adhere to strict scrutiny in enacting legislation, in contrast to the prior interpretation that Congress' power to implement legislation under section 5 of the fourteenth Amendment was equivalent to equal protection legislation under the same amendment.[118]The import of this is that the Court is saying that all provisions of the Constitution are not of equal weight, rather the Fourteenth Amendment with regards to equal protection is more powerful and takes precedent over Congress' section 5 authority. An even more important statement regarding the probable stand of the Court in future cases was the statement made by Justices Scalia and Thomas in their concurrence that they would have extended the ruling in *Adarand* to abolish affirmative action altogether. Justice Thomas stated that affirmative action could never be justified for "it is racial discrimination, pure and simple." The four dissenters were Justices Stevens, Ginsburg, Souter and Breyer. Opponents of affirmative action policy would like to see the decision in *Adarand* as sounding the death knell to racial preferences, yet that is an overly optimistic reading of the words of the Court. The government is not prohibited from responding to discrimination with aggressive affirmation action programs, it is simply that those programs are now viewed as an extremely potent narcotic which should only be used under the gravest of circumstances.

THE CIVIL RIGHTS ACT OF 1991: A REACTION TO JUDICIAL POLICY

In 1991 during the Bush administration, the Civil Rights Act of 1964 was amended in an attempt to counter recent United States Supreme Court decision concerning equal employment opportunity. The Civil Rights Act of 1991 embodies the compromise reached after prolonged and sometimes bitter disagreement between the Administration and Congress. The Act creates new remedies and other rights for plaintiffs in discrimination cases by authorizing compensatory and punitive damages and jury trials in Title VII cases alleging intentional discrimination, redefining the rules for "disparate impact" cases, limiting the rights of non-parties to challenge actions taken pursuant to orders in discrimination cases that may adversely affect their interests, making it more difficult for employers to win "mixed-motive"

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[118]Robert H. Freilich, Nicole J. Rowlette and Leonard V. Sominsky, "Federal Mandates or State and Local Initiatives: Contract and constitutional Status in the Gingrich Era." *The Urban Lawyer*. Vol. 27, No. 4. (Chicago: American Bar Association.) p. 676.

discrimination cases, expanding the rights of individuals to sue for race or ethnic discrimination under a Civil-War era statute, and lengthening the time allowed to sue based on an intentionally discriminatory seniority system. Most all of these amendments can be traced to the holding in a specific case.

Two of the most controversial changes to the law deal with compensatory damages and disparate impact. Under the Civil Rights Act of 1991, plaintiffs in Title VII and Americans with Disabilities Act (ADA) cases alleging intentional discrimination (a.k.a. disparate treatment) may recover compensatory damages for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life and other non-pecuniary losses as well as punitive damages if the defendant acted with malice or reckless indifference to the rights of the individual employees. This change expands the right to damages and a jury trial from the limited category of intentional discrimination based on race or ethnic characteristics. Prior to this amendment, intentional discrimination on the basis of gender, national origin, religion or disability could were the only instances in which an individual could sue for backpay and hiring, reinstatement or promotion. In addition, only non-jury trials were allowed. Needless to say, this greatly increases the options available to the victims of discrimination in any form.

The other most controversial issues underlying the legislation involved the type of proof needed in disparate impact, not intentional discrimination, cases. President Bush vetoed the original legislation because he felt that employers would need to resort to "quotas" in order to meet the high burden of proof now required of them. The new law has several provisions which can be traced back to specific Supreme Court rulings. Plaintiffs must demonstrate that a particular employment practice causes a disparate impact. If a plaintiff can demonstrate that the elements of an employer's decision-making process cannot be separated for analysis, the decision-making process can be analyzed as one employment practice. This provision directly overrules the decision in *Wards Cove* where the Court held that plaintiffs have to show that each particular challenged practice has a significantly disparate impact, and implied that related elements of a decision-making process could not be considered as one practice.

The Civil Rights Act of 1991 also clarifies the burden of persuasion and evidence. If the plaintiff demonstrates that a particular employment practice causes a disparate impact, the employer must demonstrate that the challenged practice is "job related" for the position in question and consistent with

business necessity. The burden of proof has shifted to the employer. With regard to the respective demonstrations that each party has to make to satisfy their respective burdens of proof, each party bears the burden of persuasion and the burden of producing evidence for its required demonstration. Prior to the legislation, the plaintiff always carried the sole burden of persuasion, a burden which is now equally shared by both parties. Even if the employer meets its burden as listed above, the plaintiff may still prevail if he of she can demonstrate that there is an alternative practice with less adverse impact on the protected group at issue and the employer refuses to adopt that alternative, which is a codification of *Albemarle*.

In regards to post-decision challenges by non-parties, the new law counters the Supreme Court decision in *Martin v Wilks*[119]where the Court held that individuals who were not parties to the underlying lawsuit were not bound by the judgment or orders in it and could challenge actions taken pursuant to the judgment that adversely affected their interests. The new law provides that a non-party generally cannot challenge a litigated or consent judgment or order if the person had actual notice of the judgment or order and the opportunity to object by a specified date, or if the person's interest were adequately represented by someone who previously challenged the judgment or order. The new law also provides that if an employer in a mixed-motive case demonstrates that it would have taken the same action in the absence of discrimination, the law is still violated and the employee can obtain declaratory and injunctive relief and attorney's fees, but the Court may not award damages or issue an order requiring reinstatement, hiring, promotion or backpay. This overrules the Courts decision in *Price Waterhouse v Hopkins*[120]where the Court held that if a plaintiff proves that an employer relied on discriminatory considerations in making an employment decision, and the employer demonstrates that it would have made the same decision in the absence of discrimination, there was no violation of law, and, therefore, no remedy for the plaintiff. This change in the law greatly enhances the power of the plaintiff and decreases the ability of the employer to attempt to justify its behavior.

The Civil Rights Act of 1991 emphasizes that 42 U.S.C. §1981 applies to all terms and conditions of employment, and thus covers harassment and dismissal where intentional discrimination based on race

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[119]*Martin v Wilks* 490 U.S. 755 (1989).
[120]*Price Waterhouse v Hopkins* 490 U.S. 228 (1989).

or ethnicity is alleged, which is directly counter to the Court's holding in *Patterson v McLean Credit Union*[121] that §1981 did not apply to post-contract formation employment issues such as harassment and termination. What the Bush Administration changes to the Civil Rights Act of 1964 shout out without question is that the legislative and executive branches of the government are willing to take a stand and not be passively guided by the rhetoric of the Supreme Court when it comes to interpreting the intent of affirmative action policy.

THE FUTURE OF AFFIRMATIVE ACTION

There is no doubt that the concept of affirmative action is under attack. This has been evidenced by developments such as the University of California System stating that as of January 1, 1997, admissions to and employment by its universities will be made without regard to race, religion, sex, color, ethnicity or national origin. In some corners the cry of reverse discrimination has escalated. Other theorists have stated that affirmative action, besides being discriminatory, is no longer needed; that the society which existed at the time of the *Brown* decision in 1954 no longer exists. In their minds we now live in a country which understands the error of its ways and no longer practices such racial and gender discrimination. If that is the case, what accounts for the fact that David Duke, of Ku Klux Klan fame, received 55% percent of the white vote in the gubernatorial race in Louisiana in 1991? If we truly live in an enlightened society what explains the Tailhook scandal within the United States Navy or that 59% of working women continue to work at low paying, traditionally female occupations earning only seventy-four cents for every dollar earned by working men? What is to be understood by the fact that Ronald Reagan, the "great communicator" opened his 1980 campaign for President in Philadelphia, Mississippi - the town where Klansmen and police murdered civil rights workers in 1964?[122] Could it possibly be that the traditional culture of white supremacy is far from dead, and given half a chance would once again raise its ugly head to capture the lion's share of the American dream?

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[121] *Patterson v McLean Credit Union* 491 U.S. 164 (1989).

[122] Gerald Horne. *Reversing Discrimination: The Case for Affirmative Action* (New York: International Publishers, 1992.) p.5.

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This is not to discount the advances which have taken place in race relations in the United States. Segregation in education has decreased dramatically. Major business concerns continue to employ a corporate policy of affirmative action. On the surface all looks fair and equal opportunity seems to flourish. The question then becomes, does that commitment to racial and gender equal exhibited to the concerned public really exist all the way to the core of the organization? Statistics on employment patterns of women and minorities, as well as the composition of those individuals living in poverty would seem to indicate otherwise. Furthermore, can the advances gained thus far be sustained if affirmative action policies are abolished altogether or even if the idea of a "color-blind" society is again ascribed to by the policy makers?

Yes, affirmative action is under attack but it is far from defeated. The Clinton administration has come out as a proponent of civil rights policy, stating that while affirmative action rules and regulations need to be improved they are still important and should be retained. Even the United States Supreme Court has declined from declaring racial preferences unconstitutional. At this point, it would be useful to attempt to determine what certainty can be gleaned from all of the Court's uncertainty, for there do still exist two knowns. First, despite all of the rhetoric to the contrary, affirmative action continues to be permissible in the both the private and public sector. Second, affirmative action may take the form of recruitment, training and hiring goals, but any policy providing for some method of racial preference enacted by federal, state or local body or private individuals will be required to pass a test of "strict scrutiny" calling for a narrowly tailored remedy or solution to a compelling state interest in compensating for identified prior discrimination. These knowns exist both in the area of education and in the area of employment, buttressed by appropriate federal and state legislation.

When attempting to determine the future for affirmative action, one must take into consideration that the status quo in governmental situations tend to be self-perpetuating. Once established in legislation and administrative regulation it takes a much greater force to remove the social policy than to allow it to remain. This resistance to change is greatly magnified when the executive branch does not either champion a drastic change of policy or even support others who do. Therefore, it is not movement in

Congress which is most likely to end the social policy of affirmative action because it has to function in an atmosphere of strong lobbies and split constituencies.

The place of greatest threat to the policy of affirmative action is the non-policy setting body of the United States Supreme Court. The shaky coalition of Justices which once comprised the minority dissent in affirmative action cases has gained sufficient numbers to now constitute the majority, albeit a majority not of one mind. As has been shown by the large numbers of opinions published for the past several affirmative action/discrimination cases, although the majority may agree on the final outcome, their thinking is widely divergent while arriving at the final conclusion. Perhaps the greatest wildcard in this hand is Justice Thomas, an individual who has publicly come out strongly against quotas and timetables, while also possessing the alleged credibility of having formerly headed the once powerful affirmative action proponent, the EEOC, as well as being able to speak as a black man. Given these facts, any change in the composition of the Court could determine the future course of affirmative action, for the current situation has resulted in impasse.

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